Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	))	MB Docket No. 10-71

To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Elizabeth Ryder
Vice President & General Counsel
5215 N. O'Connor Blvd
Suite 1400
Irving, TX 75039

May 27, 2011

TABLE OF CONTENTS

SUMMARY

In 2010, a group of multichannel video programming distributors ("MVPDs") filed a Petition for Rulemaking seeking Commission reform of the retransmission consent marketplace. These MVPDs ostensibly claim to be seeking reform for the sake of protecting their subscribers, yet their real goal is to reduce their obligation to pay broadcasters modest fees for carriage of their stations on MVPD systems. The MVPD filings are replete with numerous fallacies, allegations of broadcaster misdeeds and discriminatory practices, and claims of governmental favoritism towards broadcasters. The Commission now seeks comment on specific proosed rules as a result of the many filings made in respect of the Petition.

Unhappy with the development of a retransmission consent marketplace that requires MVPDs to pay cash for carriage, MVPDs have espoused numerous fallacies to sway the Commission's review. However, it is incumbent on the Commission to ignore all of the unsupported and simply false MVPD claims as it determines which of its proposed reforms merit adoption in this proceeding.

In addition to the abundance of misleading and erroneous allegations, the MVPDs argue that the retransmission consent marketplace scale is heavily tilted in the favor of broadcasters. Notwithstanding the MVPD litany of unfair regulations, the retransmission consent marketplace is governed by only a small number of regulations. For example, MVPDs have been granted compulsory copyright licenses to all programming carried in a broadcast station signal, thereby eliminating the need for a MVPD to negotiate with hundreds of content providers for the right to distribute the programming contained in a broadcast signal. The fees MVPDs pay for their compulsory copyright licenses are set by law and are set artificially low. In counterbalance to the compulsory copyright license, retransmission consent gives broadcasters the right to control

the distribution of their signals. These and a small number of other rules operate in symbiotic harmony to create a regulated free marketplace for retransmission consent.

MVPDs also demand that the Commission set aside the congressional finding that a broadcast station's entry into retransmission consent agreements with different terms for different MVPDs, including different pricing terms, is wholly acceptable if the different terms are based on competitive marketplace considerations. In making this demand, the MVPDs incorrectly assert that bargaining power is not a competitive marketplace consideration and, therefore, broadcasters are discriminating against certain MVPDs who lack perceived bargaining power. But just as the government does not demand that BF Goodrich charge the exact same price of car manufacturers who order millions of tires per year and the local small tire retailer, the government should not dictate that a broadcaster must charge every MVPD the exact same price.

The Commission also should set aside the demand by some MVPDs to restrict the marketplace currency to cash only. Each MVPD and each broadcaster should be permitted to determine what "fees" work best for them, whether the fees include cash, multicast carriage, channel placement or any other tangible or intangible benefit. There is simply no reason for the Commission to establish a one size fits all marketplace.

With respect to the Commission's specific proposals in this proceeding, Nexstar supports some, but does not believe others will be beneficial to the marketplace, and more importantly not beneficial to MVPD subscribers – those for whom this rulemaking is ultimately intended to benefit. Specifically, Nexstar recommends the Commission revise its good faith rules to make it a per se violation for a network to demand mandatory approval of stations' retransmission consent agreements and define what constitutes unreasonable negotiating delay.

The Commission should not make it a per se violation for a station to voluntarily delegate its negotiations to either its network (on a strictly voluntary basis) or another station. Such delegations assist stations without either the capacity or skilled employees to negotiate fair and reasonable retransmission consent agreements without harming the retransmission consent marketplace. Nor should the Commission make it a per se violation for a party to refuse to engaging in voluntary mediation, as that transforms "voluntary" to "involuntary." The Commission also should not make it a per se violation to refuse to put forth a *bona fide* proposal on important issues because such a rule will inject the Commission into the heart of a retransmission consent negotiation by requiring the Commission to (i) determine whether an issue is "important" and (ii) determine what constitutes a *bona fide* proposal. For the same reason, the Commission should refrain from determining what other terms and conditions are open to becoming per se violations of its rules. Unless the Commission intends to develop a standard retransmission consent template with a blank space for fees, at some point, the Commission must let the parties negotiate the terms of their agreement.

Nexstar further recommends that the Commission adopt revisions to its subscriber notice requirements so that subscribers have the information necessary to make informed decisions in the rare event of an approaching broadcaster/MVPD impasse. With adequate notice and information, the subscriber can make his or her own assessment and take action to protect his or her access to that programming which that subscriber deems "must-have."

With respect to the MVPD complaint that the Commission's network non-duplication and syndicated exclusivity rules prevent an MVPD from importing an out-of-market station into a market where the MVPD is involved in an impasse, it is not the Commission's rules that prohibit such importation. Rather, network affiliation agreements are akin to franchise agreements, granting each station territorial exclusivity, and it is that agreement which prohibits the importation. Therefore, eliminating the Commission's rules will not alter the actual exclusivity rights, it will simply make enforcing such rights more expensive, thereby increasing retransmission consent costs.

This proceeding ultimately is about what actions the Commission should take to ensure MVPD subscribers have access to broadcast station programming. Several MVPDs suggest permitting broadcast stations to be offered on an opt-in or a la carte basis. Nexstar recommends that the Commission explore implementing a full a la carte option for all MVPD provided programming so that subscribers can access only that programming they wish to purchase, regardless of whether such programming is broadcast or non-broadcast. After all, Section 325(b) of the Communications Act was adopted so that broadcast stations would have the same carriage rights as non-broadcast programming.

As the Commission, broadcasters and MVPDs can all agree, the retransmission consent marketplace is, for the first time a dynamic marketplace. As such, it is undergoing growing pains. Nexstar believes that with a few limited rule revisions and targeted Commission enforcement of its rules, the number of negotiating impasses will be reduced.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

To: The Commission

COMMENTS OF NEXSTAR BROADCASTING, INC.

Nexstar Broadcasting, Inc. ("Nexstar") hereby submits these comments with respect to the questions and matters raised by the Commission in its Notice of Proposed Rulemaking ("NPRM") with respect to amendment of the Commission's retransmission consent rules.[1]

The prelude to the instant NPRM began as a Petition for Rulemaking ("PFR") filed by a number of multichannel video programming distributors ("MVDPs") and a few public interest groups. The Commission sought comment on the PFR and, in response, received extensive input from broadcasters, MVPDs and public interest groups.[2] The MVPD filings demanded radical overhaul of the retransmission consent marketplace, with ample allegations and rhetoric about brinkmanship tactics, discriminatory practices and a host of other ill acts that broadcasters engage in; ignoring their own bad faith tactics. The MVPDs premised their demand for reform

[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, FCC 11-31, MB Docket No. 10-71 (rel. March 3, 2011).

[2] *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-1074, (rel. Mar. 19, 2010) ("PFR Proceeding"). References herein to filed Comments are to the commenting entity's comments submitted in the PFR Proceeding on May 18, 2010 and references to Reply Comments are to the entity's reply comments submitted on June 3, 2010 unless otherwise noted. Nexstar further notes that the complete PFR Proceeding record is publicly available and, therefore, it does not cite to every comment or reply comment that may be applicable herein.

on protecting the consumer and the consumer's access to a broadcast station's "must have" programming. However, consumer protection is not their real interest; rather it is returning to the marketplace of the days of yore when MVPDs were not required to pay cash compensation for carriage of broadcast station signals. In this NPRM, the Commission must set aside the rhetoric, ignore the myriad of MVPD propagated fallacies, and examine the facts to determine which of its retransmission consent rules and policies, if any, is in need of revision for the benefit of consumers.

In order to assist the Commission in its review, Nexstar hereby provides a brief recap of the history of retransmission consent; identification of some of the more prevalent MVPD-espoused fallacies; and a brief examination of the retransmission consent marketplace today. Nexstar then addresses the Commission's proposed revisions to (i) the good faith per se violations, (ii) the consumer notice requirements and (iii) eliminate the network non-duplication and syndicated exclusivity rules.[3] Nexstar then suggests that it may be time for the Commission to revisit implementation of a complete a la carte MVPD subscriber option.

I. RETRANSMISSION CONSENT HISTORY.

Cable operators (and now all MVPDs) obtain significant benefit from the carriage of broadcast television signals on their systems. As these MVPDs repeatedly and loudly acclaim, television broadcast signals include "must-have" in-demand programming their subscribers want access to through their MVPD service.[4] However, prior to 1992, no regulations governed cable

[3] The question of the Commission's authority to impose interim carriage or mandatory arbitration was well briefed in the PFR Proceeding. On that basis, the Commission concluded that it does not have authority to impose interim carriage or binding arbitration in the rare event of a retransmission consent impasse. Nexstar agrees with the Commission's analysis and will not reargue the matter here.

[4] This "must have" programming consists primarily of the station's local news and network primetime programming.

operators' use of television broadcast signals, and cable operators were appropriating the signals for their own use without the consent of, or compensation to, broadcasters. Such uncompensated use provided a subsidy to cable operators and raised Congressional concern about broadcasters' abilities to serve their communities. As a result, Congress enacted Section 325 of the Communications Act, which removed a cable operator's unfettered right to appropriate a broadcaster's signal without consent, giving broadcasters the right to negotiate fair compensation for a cable operator's carriage of a station's programming ("retransmission consent").[5]

As the cable and broadcast industries moved into this new era, broadcasters attempted to negotiate cash payments for carriage; however, cable operators, in industry lockstep, announced that under no circumstances would they pay broadcasters for the rights to carry broadcast signals and refused to do so.[6] Accordingly, many non-network owned broadcast stations, including Nexstar's, made must carry elections to ensure carriage of their stations by cable operators. Those that made retransmission consent elections generally ended up granting carriage rights without compensation in order to ensure that their stations were carried by the local monopoly cable companies.[7]

In 1999, direct broadcast satellite ("DBS") providers were granted the right to carry local broadcast stations on their systems, with stations granted the option to assert either must carry or

---

[5] *Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "Cable Act"). Through companion legislation, broadcasters were given the alternative to require cable systems to carry their stations on an uncompensated basis ("must carry").

[6] *The Media Business; Cable Showdown Looms Over Network Payments*, Elizabeth Kolbert, The New York Times, http://www.nytimes.com/1993/06/21/business/the-media-business-cable-showdown-looms-over-network-payments.html?pagewanted=all, June 21, 1993 (last visited May 27, 2011). See also Comments of ATV Broadcast, submitted on April 28, 2010.

[7] During this period the networks extracted value for their owned-and-operated stations primarily by securing carriage of, or increased carriage fees for, their co-owned cable networks. As the Commission proceeds herein, it must remember that just as there are smaller MVPDs, not all broadcast stations are network owned and operated stations. Accordingly, the Commission must not adopt changes to correct perceived ills related to network negotiating tactics that will unduly and negatively impact non-network owned stations.

retransmission consent carriage rights for such DBS carriage.[8] In addition, the Telecommunications Act of 1996 authorized the Commission to permit new companies to overbuild local cable providers to provide additional competition in the MVPD market.[9] As DBS providers and overbuilders (including incumbent telephone companies) entered the MVPD market, local stations were able to obtain modest fees for carriage on such systems. Accordingly, local stations finally were able to effectively utilize their retransmission consent option to obtain modest cash compensation for carriage of their signals from at least some MVPDs.

With the changing MVPD landscape, Nexstar made retransmission consent elections with respect to carriage of its stations on cable systems for the 2006-2008 election cycle; and for the first time, sought cash compensation fees from cable operators. After initial objection from cable operators, Nexstar has successfully, and without interruption, negotiated carriage agreements providing for modest fees for the 2006-2008 cycle and slightly higher, but still modest, fees for the 2009-2011 cycle.[10] Many other local broadcasters also have been able to successfully, and without interruption, negotiate to obtain modest retransmission consent fees for carriage of their stations.[11] Thus, as a result of competition from DBS providers and overbuilt terrestrial MVPDs,

[8] *Satellite Home Viewer Improvement Act*, Pub. L. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-54 (1999) ("SHVIA").

[9] Pub. L. No. 104-104, 110 Stat. 56. *See* also 47 U.S.C. §§651-653.

[10] Faced with the imminent loss of network compensation and increasing costs of producing local news, Nexstar determined that it would be unable to sustain the high quality local programming produced on its stations without another revenue source. Therefore, in its initial 2006 cycle negotiations with cable operators, Nexstar started from the premise that a per subscriber fee of one penny per day (or $3.65 for an entire year) was not an excessive, exorbitant, unreasonable fee for MVPDs to pay for the right to redistribute the valuable local news programming produced by the majority of Nexstar's stations as well as continued access to the highly rated network programming carried on Nexstar's stations. However, Nexstar, ultimately, was unable to achieve even that de minimis subscriber fee from the vast majority of MVPDs.

[11] *See e.g.* Comments of Belo Corp., p. 3. Comments of Gray Television, Inc., p. 3. Comments of National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates

the Cable Act and the rules the Commission adopted pursuant thereto finally are operating as intended, with broadcasters finally able to receive cash payments (although not yet fair market value) from all MVPDs, including cable operators, for the carriage of their stations' signals.

As with all private contractual negotiations, sometimes reasonable parties disagree on the value to be placed on the product. Thus, an unfortunate consequence of the emergence of an actual retransmission consent marketplace is the occasional dispute between broadcasters and MVPDs over carriage rights. A very few of these disputes, and associated service disruptions, primarily have been caused by MVPDs negotiating through the press, with demands for government intervention on behalf of the MVPD. However, the vast number of retransmission consent negotiations between broadcasters and MVPDs have resulted in carriage agreements without any service interruption to the MVPD subscriber or even a threat of interruption. Accordingly, the retransmission consent marketplace is generally functioning as intended and is not in need of "total" reform.

II. COMMISSION POLICY MUST BE GUIDED BY FACTS, NOT FALLACY.

In their attempt to sway the Commission to a determination that MVPDs are severely disadvantaged in retransmission consent negotiations, the MVPD Comments and Reply Comments are replete with false and unsupported statements. Nonetheless, the Commission must base its review (and any corresponding reform) on actual facts instead of the self-serving fallacies set forth below which are routinely espoused by many MVPDs.

Association, FBC Television Affiliates Association and NBC Television Affiliates (collectively, "NAB"), pp. 7-8 (service interruptions have affected only 1/100th of all negotiations).

❖ *Broadcast spectrum is "free."* Contrary to MVPD assertion, today's broadcasters neither received their spectrum for free[12] nor is the programming produced or purchased for carriage on their stations free.[13] Prior to 1994, television station licenses were awarded to the original station licensees without charge (excluding the often expensive legal charges resulting from comparative hearings) in exchange for the imposition of extensive public interest obligations on the licensee. However, the vast majority of broadcasters operating today are not the original licensees of their stations and, therefore, paid millions of dollars for the right to obtain their station licenses. Subsequent to 1996, all broadcast television station licenses have been awarded pursuant to auction.

Broadcasters also pay annual fees for the use of their spectrum as well as other fees assessed by the FCC for such use. In addition, the numerous public interest obligations, which most broadcasters not only provide, but willingly embrace, remain in effect. Finally, Nexstar notes that the television broadcast industry collectively spent more than $15 billion to convert from analog to digital operations. Accordingly, it is time for the assertion that broadcasters got their spectrum for free to be put to rest.

---

12 *See e.g.* Reply Comments of Mediacom Communications Corporation and Cequal Communications LLC d/b/a Suddenlink Communications ("Mediacom/Suddenlink"), pp. 3, 7; Reply Comments of DIRECTV, Inc. and DISH NETWORK, L.L.C., p. 3 (observing in its analogy that the real estate is given to the shopkeepers for free by the government).

13 A broadcast station that produces 15 hours of local news per week provides 780 hours of station-originated original content per year. Stations that broadcast 25 hours of local news per week provide 1300 hours of station-originated original content per year. Depending on the hourly total, for Nexstar's stations this programming can cost anywhere from $750,000 per year to upwards of $3,000,000 per year to produce. Add to that the network-originated original programming per week, for which broadcast stations are increasingly paying substantial fees, and it is clear that the much demanded consumer must-have programming can no longer be supported by advertising revenues alone. As Discovery observes, creating compelling creative programming requires significant resources. Comments of Discovery Communications LLC ("Discovery"), p. 9. If broadcasters are to sustain the compelling creative content they provide to viewers they must have the same steady and predictable revenue stream that Discovery requires.

❖ *Broadcasters are charging MVPDs excessive and unjustified fees.* MVPDs strenuously object to the rates broadcasters are seeking for carriage of their stations, complaining that the fees are ever increasing, with claims of increases of 200-400% in per subscriber fees as typical.[14] These complaints ignore the reality that broadcasters started from zero compensation less than six years ago, and when starting from zero the only direction fees can go is up.

Although the MVPD complaints about 200-400% increases in per subscriber fees may be technically accurate in some instances, when starting from zero compensation any increase in proposed fees is a statistically significant increase. For example, if a broadcaster is receiving a monthly per subscriber fee of $0.10 per month, a 400% increase means a fee of only $0.40 per month (which is 0.013 cents a day or $4.80 for the year). Even the MVPDs must acknowledge that a fee of $4.80 per year cannot be deemed excessive or exorbitant for a broadcast television station's highly rated programming services.

For those MVPDs who would complain that $4.80 for every station leads to significant increases in the subscriber fees, assuming six stations in the market each receive $0.40 per month per subscriber, the fee is only 28.80 per year for all six stations.[15] By comparison, ESPN/ESPN2 programming has a per subscriber rate in excess of $4.50 per month or more than $55 for the year.[16] TNT receives $0.99 per month or approximately $12.00 per year. For those three

---

[14] *See e.g.*, Comments of Discovery at p. 4; Bevcomm Ltr dated May 12, 2010 (referring to triple and quadruple digit increases). Nexstar notes that the PFR Proceeding record is replete with comments from outside third parties without factual knowledge (Media Access Project, Free Press, U.S. Small Business Administration, congressional letters) spouting the MVPD "rates are over-the-top" line.

[15] According to the FCC's 2011 cable rate report, the average monthly price for expanded basic cable service was $52.96 in 2009, or $635.64 per year. This same $28.80 is, therefore, only approximately 4.5% of the subscriber's annual fees. *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service and Equipment*, Report on Cable Industry Prices, DA 11-284, p. 10 (rel. Feb. 14, 2011) ("Cable Rate Report").

[16] The ESPN/ESPN2 and TNT rates are taken from *All Things Digital, Hate Paying for Cable? Here's Why.*, Peter Kafka, posted March 8, 2010 at http://mediamemo.allthingsd.com/20100308/hate-paying-for-cable-heres-the-reason-why/ (last visited May 27, 2011). Nexstar notes that the most recent SNL Kagan report sets the ESPN rate

channels alone, subscribers pay nearly $67.00 per year, or more than double what six broadcast stations would be paid. Nexstar is quite certain that, if asked, MVPD subscribers would agree that less than $30 per year to receive all of the highly demanded programming provided by their six local stations is neither unjustified nor excessive. Accordingly, the much touted 400% increase does not equate to an "unjustified" or "excessive fee.

Further, broadcasters invest millions of dollars each year in producing news and other local programming, pay to purchase quality syndicated programming for their stations, and are now being required to pay for the MVPD-designated "must see" programming from their networks. Broadcasters deserve to be fairly compensated for their programming investments as much as Discovery, TNT, TBS and every other non-broadcast programming channel does. In light of the fact that they are only a small fraction of the programming costs paid, MVPDs claims that proposed broadcaster fees are unreasonable, excessive or exorbitant ring false.

❖ *The increased fees charged by broadcasters are the sole or main reason for MVPD rate increases.* Nexstar acknowledges that MVPD subscribers face increasing rates. However, MVPD complaints that increasing retransmission consent fees are the sole, or even main, reason behind subscriber rates increases are disingenuous at best. In 1994, when retransmission consent was barely out of the box, cable operators were increasing their rates by six to nine percent, all without any payment to local stations.[17] Today, subscriber rates are

(without ESPN 2) at $4.76 per subscriber, therefore, the estimate of fees used herein has become outdated with the cost for ESPN, EPSN 2 and TNT at least $75 per year. *See* http://www.broadcastingcable.com/article/468804-SNL_Kagan_Retrans_Cash_May_Triple_By_2017.php (last visited May 27, 2011).

[17] *See e.g.*, Prestige Cable TV to raise rates for basic, expanded service, Karen Zeller, Baltimore Sun, November 17, 1994, http://articles.baltimoresun.com/1994-11-17/news/1994321111_1_prestige-customer-service-basic-service (last visited May 27, 2011).

increasing because (i) MVPDs are providing more channels to subscribers;[18] (ii) existing non-broadcast channels are increasing fees;[19] (iii) MVPDs continue to maintain high profits;[20] and (iv) broadcasters have requested modest retransmission consent fees. MVPDs ignore the first three reasons because it is easier to pass the blame for higher prices to broadcasters than it is to deal with irate consumers.

❖ *Viewers lose access to important and popular programming during retransmission consent impasses.* MVPDs also claim that subscribers lose access to broadcast programming during retransmission consent disputes.[21] To the contrary, viewers never "lose access" to a broadcaster's programming; rather they may lose access to such programming on a particular MVPD, and even that infrequently.

In the 1990s viewers had a choice of over-the-air reception or subscription to one and only one MVPD (the local cable monopoly operator). Today viewers can access broadcast programming through many competing MVPDs, and increasingly, via the Internet, as well as over-the-air. MVPD declarations regarding viewers' lack of access to television stations over-the-air is simply opportunistic propaganda unsupported by fact meant to marginalize a very valid

---

[18] In July 1995, consumers had available 44 channels at an average price of $0.60 per channel; in January 2009 consumers had available 78 channels at an average price of $0.71 per channel. Cable Rate Report, p. 10.

[19] *Id.*

[20] Time Warner Cable, for example, announced its 2010 operating income was up by 11% and that its quarterly dividend was increased by 20%. *See* http://www.rbr.com/tv-cable/time-warner-cable-boosts-dividend.html (last visited May 27, 2011). *See also* Comments of Free Press, Parents Television Council and Consumers Union, p. 8.

[21] Reply Comments of Time Warner Cable, Inc. ("Time Warner"), pp. 9-10; Reply Comments of Comments of The American Public Power Association; Braintree Electric Light Department (MA); Bristol Tennessee Essential Services (TN); Bristol Virginia Utilities (VA); Chelan County Public Utility District (Wa); Greenville Electric Utility Service (TX); City Of Glasgow Electric Plant Board (KY); Lafayette Utilities System (LA); Murray Electric System (KY); Muscatine Power And Water (IA); Norwood Light Broadband (MA); Scottsboro Electric Power Board (AL); Shrewsbury Electric Light And Cable Operations (MA); South Georgia Governmental Services Authority; and Spencer Municipal Utilities (IA) ("APPA Group"), p. 9.

consumer option. Indeed, DTV sets are now in more than 70% of US households;[22] consumers can buy a 32 inch 1080p TV from Walmart for $300;[23] or can pick up a converter box from Walmart for under $50.[24] MVPDs simply do not want to acknowledge their subscribers to have other options because when a subscriber makes a change that subscriber is not likely to return to the MVPD, thereby impacting the losing MVPD's revenues.

❖ *Broadcasters are solely to blame for all retransmission consent impasses.* MVPDs would like the Commission and consumers to believe that broadcasters are the only parties abusing the retransmission consent process, using the good faith rules for unfair and anticompetitive purposes.[25] However, the blame game goes both ways. Nexstar has experience with MVPDs who have delayed engaging in negotiations until the last minute, ignoring Nexstar's repeated and numerous attempts to begin negotiations well in advance of an agreement's expiration date.[26] In fact, one MVPD simply refused to negotiate an agreement until months after the previous agreement had expired while ignoring all demands to cease carriage of Nexstar's signals. This MVPD finally entered into an agreement due to a pending FCC complaint, only to ignore its existence and refuse to pay the contractually agreed upon fees.[27]

---

[22] http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=12047 (last visited May 27, 2011).

[23] ,http://www.walmart.com/browse/TV-Video/TVs/_/N-96v3Z1yzp72f?ic=48_0&ref=428799+4292594439&catNavId=1060825&povid=cat1060825-env258601-moduleB042311-lLinkFC1Size30to39 (last visited May 27, 2011).

[24] http://www.walmart.com/ip/Magnavox-Digital-to-Analog-TV-Converter-Box/8283870 (last visited may 27, 2011). Nexstar acknowledges that it may not be entirely convenient for a subscriber to change MVPDs or receive the programming on an over-the-air basis, but that does not alter the fact that viewers have other means of accessing a broadcast station's programming.

[25] *See e.g.* Reply Comments of Time Warner, p. 2.

[26] LIN Television also has experienced the difficulty of MVPD delay in negotiations. Comments of LIN Television Corp. pp. 9-11.

[27] Nexstar ultimately filed suit and, based on the company's bad faith actions during trial, was awarded contract damages and attorneys' fees. This MVPD has refused to honor the court judgment (thereby requiring Nexstar to

Nexstar also has other MVPDs with whom it has negotiated retransmission consent agreements that are ignoring their payment obligations under those agreements.[28] Nexstar also has negotiated with MVPDs that have refused to make *bona fide* offers and MVPDs who have stated their intent to ignore the network non-duplication and syndicated exclusivity rules in order to increase their bargaining leverage.

Further, the Commission must also be mindful that an impasse may not be either party's "fault." Broadcasters and MVPDs may have significantly different views about the value of the broadcaster's station, so even when the parties are negotiating in good faith, despite their best efforts, no agreement may be reached. Therefore, it is imperative that the Commission not disrupt the retransmission consent marketplace with numerous burdensome requirements on either party when targeted enforcement of its existing regulations will suffice.

❖ *Broadcasters have no incentive to reach agreement with MVPDs.* Continuing the theme of broadcaster "fault," MVPDs complain that broadcasters don't care if they reach carriage agreements with MVPDs.[29] However, it is quite the opposite – because broadcasters who elect retransmission consent cannot demand carriage if the parties are unable to reach a retransmission consent agreement – a failure of the parties to reach agreement negatively affects the broadcaster's revenues. MVPD carriage expands the station's reach permitting broadcasters

---

expend additional funds to collect its judgment) and continues to carry Nexstar's signals without making the contractually required payments.

28 As proved in its first attempt to collect contractually due payments, it costs an excessive amount to collect retransmission consent payments through litigation. Therefore, Nexstar believes that it will be more efficient to require payment from these MVPDs at the time it enters into new retransmission consent agreements for the next cycle. The Commission should make clear that withholding consent for past due payment is not a violation of the good faith rules, nor is demanding an upfront payment based on past actions.

29 *See e.g*, Comments of APPA Group, p. 13 (broadcasters have little, if any, interest in constructive negotiation and mutual accommodation).

to charge advertisers higher rates. Therefore, it remains in a broadcaster's interest to reach an agreement with the MVPDs.

❖ *Broadcasters force MVPDs to discontinue carriage of their stations at inopportune times.* MVPDs complain broadcasters engage in brinkmanship by forcing them to discontinue carriage of their stations just before a high profile programming event (e.g., the Super Bowl).[30] There can be no brinkmanship with a known expiration date. Either the parties will reach an agreement by that date or they will not. If they do not reach an agreement, each party knows what the repercussions are. And if there is no agreement, the MVPD is not <u>forced</u> by the broadcaster to cease carriage; rather the MVPD is not permitted by law to continue carriage.

MVPDs also complain that in those rare retransmission consent impasses where the MVPDs cannot legally carry a broadcast station, the inopportune timing of the loss of carriage rights is solely the broadcasters' fault. Each party knows when the agreement will expire, yet many MVPDs wait until the last minute to begin negotiations.[31] Further, most MVPDs seek extensions only when there is high profile programming to be lost (i.e., College Bowl games, the Super Bowl, the Academy Awards); frequently informing broadcasters that, notwithstanding the broadcasters ready agreement to an extension, they will not continue to carry a station because the agreement has expired when there is no high-profile programming involved.

---

[30] Comments of Verizon, pp. 3-4; Comments of AT&T, p 9; Comments of Bright House Networks, LLC, pp. 1-2.

[31] For example, Cablevision knew that ABC (WABC) would no longer grant extensions for carriage of WABC beyond March 3 a full two months in advance of that date. Yet Cablevision waited until the last minute to engage in good faith bargaining and, as solely as a result of its actions, did not have the right to carry WABC during the opening minutes of the Academy Awards. *See* Reply Comments of the Walt Disney Company, p. 2. During the time Cablevision should have been negotiating in good faith it was negotiating in the press for Commission intervention.

❖ *MVPDs want transparency in the negotiating process.* Multiple MVPDs demand greater transparency in the retransmission consent process, but only seek to impose such transparency requirements on broadcasters. Nexstar suggests that if the Commission imposes regulations intended to increase transparency in the negotiating process, MVPDs should be required to open their books to permit broadcasters to see the rates that MVPDs are paying to other broadcasters, including the network owned and operated stations, as well as to non-broadcast programming providers so that all content negotiations can be conducted in a full and open environment.

❖ *Must-carry regulations are relevant to this proceeding.* Notwithstanding the many declarations to the contrary, MVPDs are not, and never have been, required to carry stations that elect retransmission consent because broadcasters have no must carry rights if they have elected retransmission consent. Therefore, if an MVPD believes a broadcaster is charging an unjustified, exorbitant fee, it can make a decision not to carry that station and no law or regulation will give the station compulsory carriage rights.

III. THE RETRANSMISSION CONSENT MARKETPLACE IS WORKING AS INTENDED.

MVPDs complain of regulatory imbalances in favor of broadcasters, discriminatory practices by broadcasters and a desire for a one size fits all marketplace. However, as set forth below, there are equal regulatory burdens on both broadcasters and MVPDs, and marketplace bargaining power is not discriminatory. Just because MVPDs object to the cost of doing business with broadcast stations, that does not mean the retransmission consent marketplace is broken. Rather it is a marketplace and, as the 1992 Act makes clear, the Act was not intended to dictate the outcome of marketplace negotiations.[32] Nothing has changed in the intervening years to dictate that every MVPD must have access to the exact same programming on the exact same terms.

A. Broadcasters and MVPDs Are Equally Regulated.

The retransmission consent marketplace is a regulated "free" marketplace with regulations imposed by Congress and the Commission on broadcasters and MVPDs in careful balance. Specifically, MVPDs have been granted compulsory copyright licenses to enable them to carry a local station's full programming schedule, while broadcasters have been granted the right to negotiate fair compensation for MVPD use of that signal.

The compulsory copyright is a congressionally developed construct to assist MVPDs in efficiently negotiating for copyright clearance of all programming carried by a television station.[33] MVPDs benefit directly from these laws by eliminating the requirement that MVPDs engage in separate negotiations with multiple copyright holders to obtain copyright clearance for a single stream of programming. As the Copyright Office noted in 1997, "the cable and satellite licenses have become an integral means of bringing video services to the public."[34] Thus, without the compulsory copyright laws, MVPDs would have to negotiate for copyright clearance with every copyright holder, as well as negotiate for retransmission consent with the distributor, as opposed to just negotiating with the distributor as occurs now.

---

[32] *See e.g.*, S. Rep. No. 92, 102 Cong. 1st Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1169 ("it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations").

[33] *See* 17 U.S.C. §111 (cable) and 17 U.S.C. §119 and §122 (satellite).

[34] *See A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals*, p. 33 (August 1997). Congress has directed the Copyright Office to prepare a report addressing possible mechanisms to phase out the Section 111, 119 and 122 compulsory copyright licenses, but that report has not yet been completed. *See* Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 §302 (2010).

However, these licenses remove the ability of the copyright owner to control the distribution of their copyrighted works and result in artificially low copyright payments to those entities that are covered by compulsory copyright regulations. The rates are set by regulation and do not come close to providing fees equal to the value of the programming covered under the compulsory copyright.[35] Further, a local broadcast station does not receive any compulsory copyright payments in respect of MVPD carriage of its valuable local programming within its Designated Market Area.[36] MVPDs also benefit from the regulation requiring broadcast stations provide a good quality signal to the MVPD in order to obtain carriage.[37]

Nexstar believes these significant MVPD benefits counterbalance any broadcaster leverage generated from its right to control distribution of its signals.

In counterbalance to the compulsory copyright licenses, retransmission consent gives broadcasters control over distribution of their signal. Broadcasters also benefit from the restriction prohibiting a MVPD from carrying a local broadcast signal for less than its entire program day and the prohibition imposed on cable operators against dropping or repositioning a station during sweeps.[38]

The marketplace is further constrained by the requirement that both parties negotiate in good faith. These are the retransmission consent marketplace regulations.[39]

---

35 Larger cable operators pay a percentage of royalties based upon the gross receipts generated by the cable system while satellite carriers pay a fee on a per subscriber, per signal, per month basis. These rates are set by law – the established satellite rate for 2010 was $0.25, to be adjusted yearly based on the CPI for All Urban Consumers All Items; the cable rate is a complicated formula set forth in 37 C.F.R. §256.2.

36 Accordingly, the MVPD argument that they are paying twice for carriage of a local station due to payment of compulsory copyright fees and retransmission consent fees are completely incorrect.

37 47 U.S.C. §534(b)(3); 47 C.F.R. §76.62

38 47 C.F.R. §76.62(a); 47 U.S.C. §534b(9) and 47 C.F.R. §76.1601 n.1.

39 Contrary to MVPD claims, the must carry and corresponding carry one, carry all requirements are not a part of the retransmission consent marketplace because once a broadcaster enters the retransmission consent marketplace

Although the MVPDs claim it is the major disparity in these regulations that permit broadcasters to exercise undue influence in the retransmission consent marketplace, the reality is that the biggest game changer in the negotiation process comes from the fact that the retransmission consent marketplace is now competitive, with multiple MVPDs serving most markets. It is this fact alone that has recently given broadcasters the ability to negotiate for cash compensation. And contrary to the MVPDs repeated cries of "broadcaster favoritism" it is this fact that finally has created symbiotic balance in the retransmission consent marketplace, providing broadcasters with the opportunity to obtain cash compensation for their signals many long years after Congress gave them the right. Thus, the MVPDs argument that they are disadvantaged by the government regulations imposed on them in this marketplace is just one more hollow argument to justify why MVPDs should not be required to pay broadcasters a reasonable fee for carriage of the broadcasters' signals and the programming contained therein.

B. The Retransmission Consent Marketplace Is Not Discriminatory.

Certain MVPDs claim that the retransmission consent marketplace is discriminatory.[40] Discrimination is the treatment of one company worse than another for arbitrary or unlawful reasons. Nondiscriminatory treatment does not require every company to be treated identically so long as differences are based on objective business criteria. Bargaining power (based on the

---

these regulations are wholly inapplicable. And, as discussed in Section VI below, the network non-duplication and syndicated exclusivity regulations are borne out of the contracts between networks and their affiliates with the regulations merely acting as a non-litigation enforcement mechanism. Arguments that broadcasters derive significant negotiating leverage from the Commission's mandate that MVPDs carry certain program related material (47 U.S.C. §534(b)(3) and 47 C.F.R. §76.62) is nothing more than a desperate attempt to pile on as many regulations as possible to the MVPD side of the ledger in hopes that the Commission will be swayed by the sheer number of regulations MVPDs operate under to believe that the marketplace is unbalanced.

[40] *See* Comments of American Cable Association ("ACA"), pp. 2, 4-9; Comments of Cablevision, p. 4. Nexstar notes that the study attached to the ACA comments does not contain any actual data on smaller MVPDs being charged higher rates; rather, Professor Rogerson evaluates other reports and third party statements and interprets them in a manner to support his premise. This argument also ignores that a "small" MVPD may control a large share of a particular market thereby controlling the majority of subscribers to which a broadcaster is negotiating for access. Thus, even though "small," this MVPD would have substantial negotiating leverage for that market.

MVPDs size and market reach) is a marketplace consideration and no amount of "discrimination" claims can alter the basic fact that price disparities between MPVDs in the same market that are based on bargaining power are not in and of themselves discriminatory or otherwise violations of the good faith negotiating requirements.

In addition to the basic complaint of discrimination disadvantage, various MVPDs argue that the existing retransmission consent market needs to be reformed because there should be a good faith requirement that no MVPD be required to pay more to a broadcaster than any other MVPD. Indeed, smaller MVPDs seem to be arguing that they should be treated specially just because they are small.[41] Setting aside the fact that there is not one shred of actual evidence to support this claim, it is up to neither the broadcasters nor the government to provide subsidies to smaller competitors simply because they are small. The government does not intervene based on the bargaining power of one entity verses another. For example, the government does not tell BF Goodrich that it must sell its tires to small local tire distributors for the exact same price that it sells those same tires to car manufacturers who purchase millions more tires yearly.

Further, the claim that many of the smaller MPVDs are charged higher rates because they are new entrants may be true, but, with respect to Nexstar's negotiations, that is not because they are "new" or "smaller." Nexstar's existing incumbent agreements reflect rates that were commensurate with the time such agreements were negotiated. As those existing agreements expire, incumbents will be offered rates commensurate with the current time of negotiations, just as new entrants are.

Curiously MVPDs do not seek to offer smaller existing broadcasters or new entrant broadcasters equivalent protection. That is, they do not seek Commission imposition of a requirement that a small or new MyNetwork affiliate be paid the same "non-discriminatory" fee

---

[41] Reply Comments of APPA Group p. 4.

as the ABC, NBC or CBS affiliate. Nor do MVPDs seek a regulation that requires every MVPD to pay every broadcaster (who carries the exact same network programming), whether owned and operated by the network, owned by a group or a single market station owner, the same despite the disparity in each party's bargaining power. Indeed, Nexstar suspects that MVPDs would object strenuously if the Commission proposed granting such protections to broadcasters.

Rate disparities are not a lack of good faith bargaining, but are merely a reflection of the relative bargaining power of each party to the negotiation. In fact Congress itself recognized this fact when it stated that "it shall not be a failure to negotiate in good faith if television the broadcast station enters into retransmission consent agreements containing different terms and conditions, including pricing terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace decisions."[42] Accordingly, the Commission should affirm that competitive market considerations includes bargaining power, which includes the geographic footprint of the MVPD, the size of the MVPD and subscriber numbers involved in the negotiation, and the "services" offered (i.e., anything offered beyond cash).

C. The Retransmission Consent Marketplace Should Not Be Regulated As If One Size Fits All.

Certain MVPDs demand that the Commission declare the retransmission consent marketplace cash only thereby prohibiting willing MVPDs and broadcasters from reaching agreements that include compensation in forms other than cash – for example, carriage of additional or multicast channels, advertising expenditures, grant of video on demand rights, tier

[42] 47 U.S.C. §325(b)(3)(C)(ii).

of carriage, term, signal delivery or any other non-cash benefit.[43] Yet other MVPDs argue that such alternatives are perfectly legitimate. In fact, through 2005, the majority of retransmission consent agreements involved other than cash consideration, including agreements to carry new services or advertising support.[44] If MVPDs cannot agree between themselves what practices are problematically discriminatory then neither broadcasters nor the Commission should be required to make that determination on their behalf.

Simply put, one size does not fit all and it is not a violation of the Commission's good faith negotiating rules nor is it discriminatory for broadcasters to accommodate MVPD requests for different treatment. Every MVPD has its own ideas of what it will agree to "pay" for carriage and arbitrarily limiting MVPD and broadcaster choice will likely create more – not less – carriage interruptions. There is no reason to implement rules that force a one size fits all on every industry participant.

IV. SOME, BUT NOT ALL, OF THE PROPOSED PER SE VIOLATION CHANGES ARE WORTHY OF CONSIDERATION.

In the PFR Proceeding, MVPD cries of overwhelming evidence of broadcaster abuses are long on rhetoric and short on specifics, and overall the retransmission consent marketplace functions as it should. Nonetheless, Nexstar believes certain of the Commission's proposed additions to the list of per se violations may have merit, while others do not.

A. It Should Be a Per Se Violation For a Station To Agree To Give a Network With Which It Is Affiliated The Right To Approve a Retransmission Consent Agreement With An MVPD Or To Comply With Such An Approval Provision.

---

43 Comments of Cablevision, pp. 3, 15-17. Comments of Starz Entertainment, LLC.; Comments of Cox Communications, pp. 6-7

44 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (rel. Sept. 8, 2005).

It is a violation of the per se good faith rules for the negotiating entity to fail to designate a representative who can make binding representations and agreements for retransmission consent. Therefore, Nexstar believes that it is in the best interest of the retransmission consent marketplace for the Commission to make it a per se violation for affiliates to be required to provide a network with veto power over its ability to grant retransmission consent for its station's signal within its DMA. Network interest in its affiliates' retransmission consent negotiations should be limited to the compensation a network will obtain pursuant to the affiliation agreement. Local stations must have control over the right to grant retransmission consent over their entire signal.

That said, Nexstar does not believe that this requirement should in any way limit the network and affiliate from reaching a mutually satisfactory agreement that permits the network to be the designated negotiating agent for the station if the affiliate elects to opt-in to such negotiation, provided that a mandatory requirement to opt-in may not be a term of the affiliation agreement. For example, the recently proposed entirely voluntary arrangement proposed between NBC and its affiliates should not be considered a per se violation of the good faith negotiating rules.[45]

B. It Should Not Be A Per Se Violation For A Station To Grant Another Station Or Station Group (i) The Right To Negotiate Or (ii) The Power To Approve Its Retransmission Consent Agreement When The Stations Are Not Commonly Owned.

The Commission should not deem it a per se violation of the good faith negotiating rules for a station to designate another station or station group (or network) authority to negotiate on its behalf for retransmission consent. Such joint negotiations provide for efficiency in the

---

[45] *See* http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php (last visited May 27, 2011).

negotiating process and allow the designating station to receive the benefits of skilled negotiators at de minimis charges through local marketing and other service sharing agreements. Accordingly, preventing such joint negotiations likely would lead to increased retransmission consent fees rather than decreased fees because the designating station would need to separately hire someone else to negotiate for them.

MVPDs assert that the retransmission consent fees are higher as a result of such joint negotiations and such joint negotiations might result in the simultaneous withdrawal of two stations at one time.[46] MVPDs also assert that there are unspecified problems with such joint negotiations. However, the objecting MVPDs provided scant evidence beyond hypothetical assumptions to establish that such joint negotiations actually result in higher fees. In contrast to such speculation, Nexstar affirms that Nexstar offers the same rates for its stations in single station markets and for its stations in its shared services markets and that the negotiated rate for its stations would not change if Nexstar is not permitted to negotiate on behalf of the stations under a shared services agreement. It also is highly likely that the rates for the shared services station on whose behalf Nexstar negotiates would increase incrementally over the jointly negotiated rate because Nexstar's shared services partner would need to hire someone to handle its negotiations.[47] In addition, such joint negotiations are more efficient for all parties involved because one entity, with the consent of the other, has authority to negotiate and bind multiple stations.

---

[46] Comments of ACA, p. 3. Again, ACA's expert study is long on speculation and short on actual facts in support of this premise.

[47] Nexstar's shared services partner does not have the staff capacity to negotiate 200 plus retransmission consent negotiations. Accordingly, it would have to either hire a full-time staff person or an outside consultant (i.e., law firm) to handle the negotiations.

With respect to MVPD complaints that such joint negotiations may simultaneously cause the loss of two stations in the market, simply negotiating with each station separately will not eliminate the potential loss of two network affiliated stations at the same time because agreements may expire on the same date. Indeed, depending on the expiration date of its retransmission consent agreements, an MVPD could face loss of all of the network affiliated stations in a market on the same date. This is so whether one party negotiates on behalf of another or not.

The NPRM raises a concern that there may be delays in the negotiating process or that negotiations may become unnecessarily complicated if the MVPD is forced to negotiate with multiple parties with divergent interests.[48] Contrary to the Commission's speculations, there are no divergent interests between Nexstar's interests and its shared services partners interests because the interests of both parties are aligned in securing carriage on favorable terms. In addition, and again contrary to the Commission's speculation, the MVPD is not forced to negotiate with multiple parties. Indeed the negotiations are more streamlined because the MVPD is negotiating with one party who has binding authority to agree to grant retransmission consent for multiple stations. Finally, there is no evidence that joint negotiations lead to more frequent retransmission consent impasses. In fact, such joint negotiations may lead to fewer such impasses as there are less negotiations to result in impasse.

[48] Nexstar believes this concern is more valid with respect to permitting MVPDs to pool their resources and negotiate as a group as there likely will be multiple MVPD parties with interests in different markets. However, if the Commission determines to consider permitting MVPDs to jointly negotiate it should carefully limit the size of participating MVPDs to those that are truly small, providing service to fewer than 50,000 subscribers nationwide and 1,000 subscribers in any market.

C. It Should Not Be A Per Se Violation For A Negotiating Entity To Refuse To Put Forth *Bona Fide* Proposals On Important Issues.

The Commission has recognized that it is limited by statute in its oversight of the retransmission consent negotiating process.[49] This proposal will inject the Commission into the heart of retransmission consent negotiations. What constitutes an "important issue" will vary from negotiation to negotiation. For instance, in one negotiation the important issue may be multicast carriage, in another it may be channel positioning, in another it may be rates. Nexstar also does not believe that it is possible for the Commission to determine what constitutes a "*bona fide* proposal" without injecting itself into the middle of the negotiations. For example, is it a *bona fide* proposal to seek a four year term of agreement, rather than three or five? Accordingly, the Commission should not adopt its proposal to deem it a per se violation of the good faith negotiating rules for a party to refuse to put forth *bona fide* proposals on important issues.

D. It Should Not Be A Per Se Violation For A Negotiating Entity To Refuse To Agree To Non-Binding Mediation When The Parties Reach An Impasse Within Thirty Days From The Expiration Of Their Retransmission Consent Agreement.

As both MVPDs and broadcasters have acknowledged, arbitration and mediation are expensive and not likely to result in an agreement.[50] Further, making it a per se violation for a party to refuse to agree to non-binding mediation makes such participation a non-voluntary choice. As the Commission has acknowledged, it does not believe it has the authority to implement mandatory binding resolution dispute procedures.[51] Accordingly, the Commission should not make this change.

---

49 *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, ¶13 (2000).

50 *See e.g.*, Comments of Free Market Operators, pp. 2-3.

51 NPRM at ¶19.

Nonetheless, Nexstar believes that more parties might be encouraged to engage voluntarily in non-binding arbitration if the Commission establishes the basic procedures under which such arbitrations agreed to by the participants would occur. For example, establishing where such arbitration is to be held, how the arbitrator is to be selected, requiring the parties to split the fees, requiring the arbitration to be concluded prior to expiration of the existing retransmission consent agreement (or provide for retroactive adjustment if completed after; except that all arbitrations should be completed within 60 days of the agreement expiration date), and establishing confidentiality procedures (such that the parties can provide certain information to the arbitrator without a corresponding disclosure to the other party). The Commission should also affirm that best offer arbitration is not beneficial and that the arbitrator should be able to look at all of the facts and make its own assessment. The Commission further should confirm that arbitrators may make fee recommendations based on audience delivery.

E. The Commission Should Define What It Means By "Unreasonably Delay" In Retransmission Consent Negotiations.

The MVPD contingent makes allegations of "brinkmanship tactics" employed by broadcasters while wholly ignoring the fact that some MVPDs are guilty of waiting until the last minute to get serious about negotiations, or even start negotiations, in the hope that broadcasters will back down or make concessions in order to retain carriage.[52] Other MVPDs have refused to engage in negotiations while positioning themselves in the media as in need of Commission intervention in the negotiations, only resuming negotiations when the Commission has made clear that it will not mandate interim carriage. Indeed, Nexstar believes the number of consumer

[52] Reply Comments of Time Warner, p. 2. Comments of LIN Television, pp. 9-11. Each party to an existing agreement is well aware of the agreement expiration date and each party knows what the repercussions of failing to reach a new agreement by that date are. Thus, MVPDs who delay engaging in negotiations until the last possible moment cannot then be heard to complain that refusal by the broadcaster to grant an extension of time for continued carriage, constitutes either bad faith or a brinkmanship tactic.

interruptions have escalated based on MVPD assumptions that the Commission will intervene at the last minute to prevent consumer loss. Accordingly, Nexstar believes that adoption of a definition of what constitutes unreasonable delay would be helpful. Indeed, if the Commission required parties to negotiate in a timely manner, MVPDs are more likely to know that they have reached impasse in time to make the required subscriber notifications without "confusing" or "frightening" them.

Nexstar does not have specific recommendations on what should constitute unreasonable delay. Many retransmission consent agreements are negotiated between October 1 and December 31 in the election year. Accordingly, both broadcasters and MVPDs will be negotiating a large number of agreements in that short period and setting a specific day count for responses may not be workable. However, Nexstar believes that negotiations should be commenced as early in October as possible, and that all parties should be prohibited from waiting until December 1 or later to respond to an initial offer from the other party. In addition, Nexstar believes waiting more than two weeks to respond to a proposal is unreasonable absent exigent circumstances. Further, the closer to the agreement expiration deadline the parties get, the shorter the response time should be.

F. Other Terms and Conditions.

The Commission also seeks input on a number of additional terms, such as whether a broadcaster's request or requirement that an MVPD not carry a significantly-viewed station, inclusion of most favored nation clauses ("MFNs") presumably with respect to both MPVDs and broadcasters, and the inclusion of other programming in negotiating packages should be per se violations of the good faith negotiating requirements.[53] Each of these is just a term to be

[53] Nexstar is unsure whether the Commission is seeking to require or prohibit most favored nation clauses or is merely seeking more information. However, Nexstar notes that, in its negotiations, it has been larger MVPDs who

negotiated based on the importance of such term to the negotiating parties. Unless the Commission intends to develop a required template of all terms and conditions of the agreement, with broadcasters and MVPDs limited to inserting rates only, at some point the Commission has to let the parties negotiate the specific terms of their agreement.

V. CONSUMERS MUST HAVE ADEQUATE NOTICE.

If consumers have notice they may choose a course of action and are therefore not a pawn of either party during a retransmission consent negotiation. Yet, notwithstanding the fact that adequate notice helps prepare subscribers for disruption of their video service, MVPDs almost uniformly object to providing their subscribers with any notice related to on-going retransmission consent negotiations.[54] MVPDs argue that requiring them to provide advance notice encourages brinkmanship tactics by broadcasters, pushes MVPDs to accept unreasonable terms, and causes unjustified subscriber anxiety. Nexstar agrees that advance notice may sometimes cause unnecessary subscriber anxiety; however, the alternative of failing to give notice deprives the subscriber of the information needed to make an informed decision.

MVPDs again trot out the broadcaster "brinkmanship allegation" to convince the Commission that MVPDs should not be obligated to provide their subscribers with advance notice of a potential service disruption. However, MVPDs are always aware of the date on which existing retransmission consent agreements will expire; thus, the only "brinkmanship" a broadcaster can engage in with respect to a known date is through a refusal to negotiate in

request MFNs. To the extent Nexstar agrees to include an MFN clause in its agreements, Nexstar requires that the MFN be reciprocal. Further, Nexstar is uncertain how an MFN requirement would be managed short of requiring that every agreement have the same rates. For example, Nexstar has over 200 retransmission consent agreements. If it agrees to add an MFN to a new agreement, which other existing agreement would the MFN provision be applicable too?

[54] Cox Comments at p. 4; Reply Comments of Time Warner, p. 16; Reply Comments of Cablevision, pp. 7-10; Reply Comments of Mediacom/Suddenlink, p. 30.

advance of such date in violation of the good faith negotiating rules. Otherwise, to the extent a MVPD assumes that it will reach an agreement or get an extension and, therefore will not need to give notice, the MVPD is making a tactical decision at the expense of its subscribers.[55]

MVPD complaints that giving subscribers advance notice causes them to agree to unreasonable terms is equally specious. There is no connection between a requirement to notify subscribers of a potential loss of a broadcast station and the terms of carriage.

The point of advance notice requirements is for subscribers to be informed and protected, not broadcasters or MVPDs. If, as the MVPDs allegedly claim, they are seeking retransmission consent reform for the benefit of subscribers (and not simply their own interests), MVPDs should have no objection to providing the notice that lets its subscribers know the situation so they can make informed decisions. Very simply, to the extent MVPDs wish to avoid complying with notice requirements, they can seek to complete negotiations prior to the date of notice obligations, rather than dragging them out until the bitter end in hopes that the broadcaster will alter its position to ensure continued carriage.

Nexstar believes the Commission's proposal to require MVPDs to provide notice of expiration 30 days in advance unless a renewal or extension has been executed coupled with a notice at the expiration that, to the extent necessary, the agreement has expired and the parties have not reached agreement will provide subscribers with sufficient notice of the parties' negotiating status if agreement has not been reached. Nexstar does not believe additional notice requirements beyond the expiration date would be necessary as the subscriber would then be on notice that the parties have not reached an agreement and s/he may be subject to loss of the station in the future.

---

[55] Nexstar routinely informs its negotiating partners that there will be no extensions granted in order to encourage early and *bona fide* negotiations. However, if the parties have reached an agreement in principal, Nexstar routinely will agree to an extension while the terms are documented.

Nexstar does not object to notice requirements for broadcasters in concept; however, any over-the-air notice provided by a broadcaster will be received by the entire market, including station viewers who are not subject to potential signal loss. Such notification, when smaller systems are involved, may cause unnecessary confusion among those who are not potentially losing the signal. Accordingly, Nexstar recommends that any broadcaster required notice requirements be limited to MVPDs with more than 1,000 subscribers.

VI. THE COMMISSION SHOULD NOT ELIMINATE THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES.

MVPDs complain that the Commission's network non-duplication and syndicated exclusivity rules (the "Exclusivity Rules") effectively limit an MVPD to a single source for programming that consumers expect to receive, and that if the Commission eliminates these rules they (the MVPDs) will be able to freely negotiate with out-of-market stations to carry such stations in markets where they are unable to reach a retransmission consent agreement with the in-market station.[56] In making this claim, most MVPDs entirely ignore that the Exclusivity Rules are nothing more than a regulatory enforcement mechanism for underlying private contractual territorial exclusivity arrangements between affiliates and their networks, and eliminating the rules will not provide MVPDs with additional partners to negotiate for network programming. In fact, eliminating the Exclusivity Rules will only serve to increase the costs of enforcing the contractual right, which in turn will increase retransmission consent fees.[57]

---

[56] *See e.g.* Comments of Verizon, p. 3; Comments of OPASTCO et. al, p. 5. Being limited to a single source of programming is nothing unique with respect to broadcast stations, there is only one ESPN provider, one USA provider, one TNT provider, etc. Consumers expect their MVPDs to provide this programming just as much as they expect the MVPD to provide local broadcast stations.

[57] To the extent the Commission eliminates the network non-duplication and syndicated exclusivity rules, broadcasters would be limited to filing lawsuits to enforce their territorial exclusivity rights. To the extent such lawsuits are the result of MVPD interference in contractual relationships, broadcasters would seek to recoup their legal fees in court, through increased retransmission consent fees or both.

To the extent the MVPDs are arguing for the Commission to abrogate the existing underlying contractual territorial exclusivity rights, the Commission should decline to do so. Network affiliation agreements are akin to franchise agreements in that the network grants the affiliate the right to market the network programming within the specific territory (its Designated Market Area). The affiliation agreement typically states that the local affiliate has exclusive "first call" rights to network programming for the market and the majority of other agreement terms (including affiliation agreement fees, advertising availability splits, and promotional rights and obligations among others) are agreed to based on the fact that the local station is granted such exclusivity in its market.

Abrogating the central contractual provision of the agreement would result in all agreements having to be entirely renegotiated, if in fact a network could find a station willing to serve as an affiliate with the knowledge that another station could enter its market at will. Commission abrogation of the network territorial exclusivity right also would irrevocably damage the entire economic structure of the affiliation marketplace harming advertisers and viewers, as well as networks and affiliates. Moreover, disrupting the network-affiliate relationship would not preserve subscriber access to the local news broadcast on the in-market station as the local, in-market station(s) is, and would remain, the only option an MVPD subscriber has for such news.

MVPDs also claim that the Exclusivity Rules provide broadcasters with unfair leverage during the parties' negotiations. This MVPD claim again ignores reality. The rules actually benefit MVPDs by limiting the geographic area in which a station can assert its territorial exclusivity, exclude small cable systems and DBS zip codes with few subscribers, exempt significantly viewed stations from enforcement of the rules, and require that broadcasters follow certain requirements in order to exercise the rights.

For the above reasons, there is no benefit to eliminating the Exclusivity Rules and the Commission should not do so.

VII. IT IS TIME FOR THE COMMISSION TO CONSIDER IMPLEMENTING AN A LA CARTE PROGRAMMING SELECTION.

MVPDs blame broadcasters for their subscribers' rising programming costs, but broadcast retransmission consent fees are only a small fraction of all programming fees.[58] Several MVPDs have suggested that broadcast stations should be offered on a separate tier.[59] In addition, several public interest groups advocate for a mechanism to permit MVPD subscribers to opt-out of receiving channels they do not wish to receive.[60] Nexstar believes the time has come for the Commission to revisit allowing consumers to choose their MVPD programming on an a la carte basis to the extent it is statutorily permitted to do so.[61] As Time Warner has rightly acknowledged, without a la carte options, consumers are forced to subscribe to and pay for programming that they may not want, and there is no market-based mechanism to discipline rising MVPD rates.[62] Under a purely a la carte regime, consumers will see the programming

---

[58] *See e.g.*, Comments of NAB, pp. 34-35.

[59] Comments of the Free Market Operators, p. 7; Ex Parte Letter of Time Warner Cable, Inc. dated February 24, 2011, p. 4; Joint Reply Comments of Dish and DirecTV, p. 3. Nexstar agrees with the Free Market Operators suggestion that broadcasters and non-broadcasters should be treated equally, with no subscriber required to take any programming in order to receive any other programming.

[60] Comments of Free Press, Parents Television Council and Consumers Union, pp. 7-9/Reply Comments of Consumers Union, Free Press, Media Access Project and Parents Television Council, p. 5.

[61] The Cable Act requires broadcast stations to be placed on the basic service tier for any cable system not subject to effective competition. However, Nexstar believes that the Commission should consider whether non-must carry stations can be offered on an opt-in basis for that tier.

[62] One consumer desires a la carte so substantially the he filed a letter seeking consumer programming choice in the PFR Proceeding. *See* Letter of Gerald Zimmerman dated May 16, 2010.

costs for all channels and have the right to opt-out of receiving any channel they do not wish to pay for. Nexstar is certain that most consumers who subscribe to MVPDs would choose its stations on an a la carte basis, even at $1.00 or more per month, based on the quality and local content of the programming Nexstar provides on its stations.

An a la carte model would allow subscribers with no interest in sports to save upwards of $10 per month for programming they never watch. Or those without children, with no interest in Disney Channel, Nick, Cartoon Network, etc. could eliminate a few dollars from their monthly MVPD bill. A la carte would diminish carriage disputes for both broadcast as well as non-broadcast programming. The MVPD would simply reach an agreement for carriage at a certain price and the subscriber would make his or her own value judgment as to whether they wish to purchase that programming at that price. Implementing an a la carte regime will also ameliorate the plethora of consumer complaints that MVPD prices are too high as consumers will be able to pay for exactly what they want and no more. Accordingly, the Commission should consider revising its rules as necessary to implement full consumer choice for MVPD programming.

VIII. CONCLUSION

The retransmission consent marketplace is undergoing growing pains as broadcast station compensation goes from zero to a reasonable value. Time Warner has stated "the issue is not whether MVPDs should carry broadcast signals, or whether MVPDs should pay for such carriage, but whether the Commission should reform the process to ensure that viewers are not held hostage to the retransmission consent process."[63] Nexstar agrees. When the parties actually negotiate in good faith, there are very few instances where the parties do not reach agreement in advance of a current retransmission consent agreement's expiration date.

---

[63] Reply Comments of Time Warner Cable, Inc., p. 10.

However, most MVPDs are seeking reforms that will result in the Commission dictating the outcome of retransmission consent negotiations – something the Commission has expressly said it will not do. Therefore, the Commission should make no more than the modest adjustment to its per se violation rules as proposed herein. The Commission also should implement stronger consumer protection notice requirements. Nexstar further believes the one area the Commission should explore that will result in the most options for consumers is an open and viable a la carte channel selection mechanism.

Respectfully submitted,

NEXSTAR BROADCASTING, INC.

Elizabeth Ryder

Elizabeth Ryder
Vice President & General Counsel
5215 N. O'Connor Blvd
Suite 1400
Irving, TX 75039
(972) 373-8800